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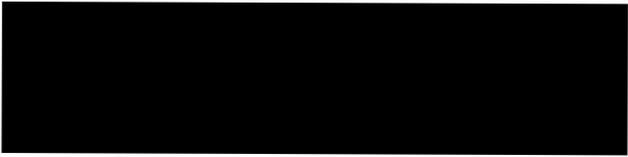
FILE: SRC 04 196 50500 Office: TEXAS SERVICE CENTER Date: JAN 20 2011

IN RE: Petitioner: [Redacted]
Beneficiary: [Redacted]

PETITION: Petition for a Nonimmigrant Worker Pursuant to Section 101(a)(15)(H)(i)(b) of the
Immigration and Nationality Act, 8 U.S.C. § 1101(a)(15)(H)(i)(b)

ON BEHALF OF PETITIONER:

SELF-REPRESENTED



PHOTOCOPY

INSTRUCTIONS:

This is the decision of the Administrative Appeals Office in your case. All documents have been returned to the office that originally decided your case. Any further inquiry must be made to that office.

Robert P. Wiemann, Chief
Administrative Appeals Office

DISCUSSION: The director of the service center denied the nonimmigrant visa petition and the matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed. The petition will be denied.

The petitioner is a health care facility – hospital. It seeks to extend its employment of the beneficiary as a medical technologist, and endeavors to classify him as a nonimmigrant worker in a specialty occupation pursuant to section 101(a)(15)(H)(i)(b) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1101(a)(15)(H)(i)(b).

The director denied the petition on the ground that the petitioner failed to furnish a certified labor condition application (LCA). Counsel submitted a timely appeal.

The record in this proceeding contains: (1) the Form I-129 petition and supporting documents that Citizenship and Immigration Services (CIS) received on July 12, 2004; (2) the director's request for evidence (RFE); (3) the petitioner's response to the RFE; (4) the director's decision; and (5) the Form I-290B and supporting documents. The AAO reviewed the record in its entirety before issuing its decision.

Section 214(i)(1) of the Act, 8 U.S.C. § 1184(i)(1), defines the term "specialty occupation" as an occupation that requires:

- (A) theoretical and practical application of a body of highly specialized knowledge, and
- (B) attainment of a bachelor's or higher degree in the specific specialty (or its equivalent) as a minimum for entry into the occupation in the United States.

Pursuant to 8 C.F.R. § 214.2(h)(4)(iii)(B), the petitioner shall submit the following with an H-1B petition involving a specialty occupation:

1. A certification from the Secretary of Labor that the petitioner has filed a labor condition application with the Secretary,
2. A statement that it will comply with the terms of the labor condition application for the duration of the alien's authorized period of stay,
3. Evidence that the alien qualifies to perform services in the specialty occupation.

The regulation at 8 C.F.R. § 214.2(h)(15)(ii)(B)(1) states that the request for extension must be accompanied by either a new or a photocopy of the prior certification from the Department of Labor that the petitioner continues to have on file a labor condition application valid for the period of time requested for the occupation.

The Form I-129 petition was received by CIS on July 12, 2004. It reflects that the beneficiary currently holds H-1B status that will expire on September 30, 2004, and that the petitioner seeks to continue and extend the beneficiary's employment without change. The petitioner did not provide the beneficiary's dates of intended employment there. The record contains two LCAs. The LCA submitted with the petition was certified on

October 2, 2001; it shows the beneficiary's intended period of employment as October 17, 2001 to September 30, 2004. The LCA submitted in response to the RFE was certified on September 13, 2005; it indicates employment dates of September 13, 2005 to July 15, 2007.

Based on the regulations, the petitioner is required to furnish to CIS a certified LCA reflecting the valid beginning and ending dates of employment of the beneficiary. It is incumbent upon the petitioner to file the proper documents in order to establish eligibility for a benefit. The petitioner must establish eligibility at the time of filing the nonimmigrant visa petition. A visa petition may not be approved at the future date after the petitioner or beneficiary becomes eligible under a new set of facts. *See Matter of Michelin Tire Corp.*, 17 I&N Dec. 248 (Reg. Comm. 1978).

The evidence of record reflects that the petitioner failed to establish eligibility at the time of filing the nonimmigrant visa petition. The LCA certified on October 2, 2001 does not reflect dates of employment that extend the beneficiary's employment with the petitioner. The LCA indicates the beneficiary will be employed with the petitioner from October 17, 2001 to September 30, 2004; however, the beneficiary's H-1B status with the petitioner expires on September 30, 2004. The November 2, 2006 letter from the beneficiary states that the petitioner submitted the LCA that pertained to the prior H-1B petition.

The LCA submitted in response to the RFE was certified on September 13, 2005, which is 428 days after the July 12, 2004 filing date of the petition. The petitioner on appeal states that the LCA was certified after the filing date of the petition because the petitioner received the RFE requesting a certified LCA on December 29, 2005. The petitioner's assertion is not persuasive. The regulation at 8 C.F.R. § 214.2(h)(4)(iii)(B) indicates that *before* the petitioner files an H-1B petition with CIS it is required to have a certification from the Secretary of Labor that establishes that it has filed a labor condition application with the Secretary. The record evinces that the petitioner did not obtain such a certification from the Secretary of Labor before filing the H-1B petition.

Based on the evidence in the record, the petitioner has not complied with the regulation at 8 C.F.R. § 214.2(h)(4)(iii)(B). For this reason, the petition will be denied.

The burden of proof in these proceedings rests solely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. The petitioner has not sustained that burden.

ORDER: The appeal is dismissed. The petition is denied.